TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 370.

JOHN T. BOSKE, SHERIFF OF KENTON COUNTY, KENTUCKY, APPELLANT,

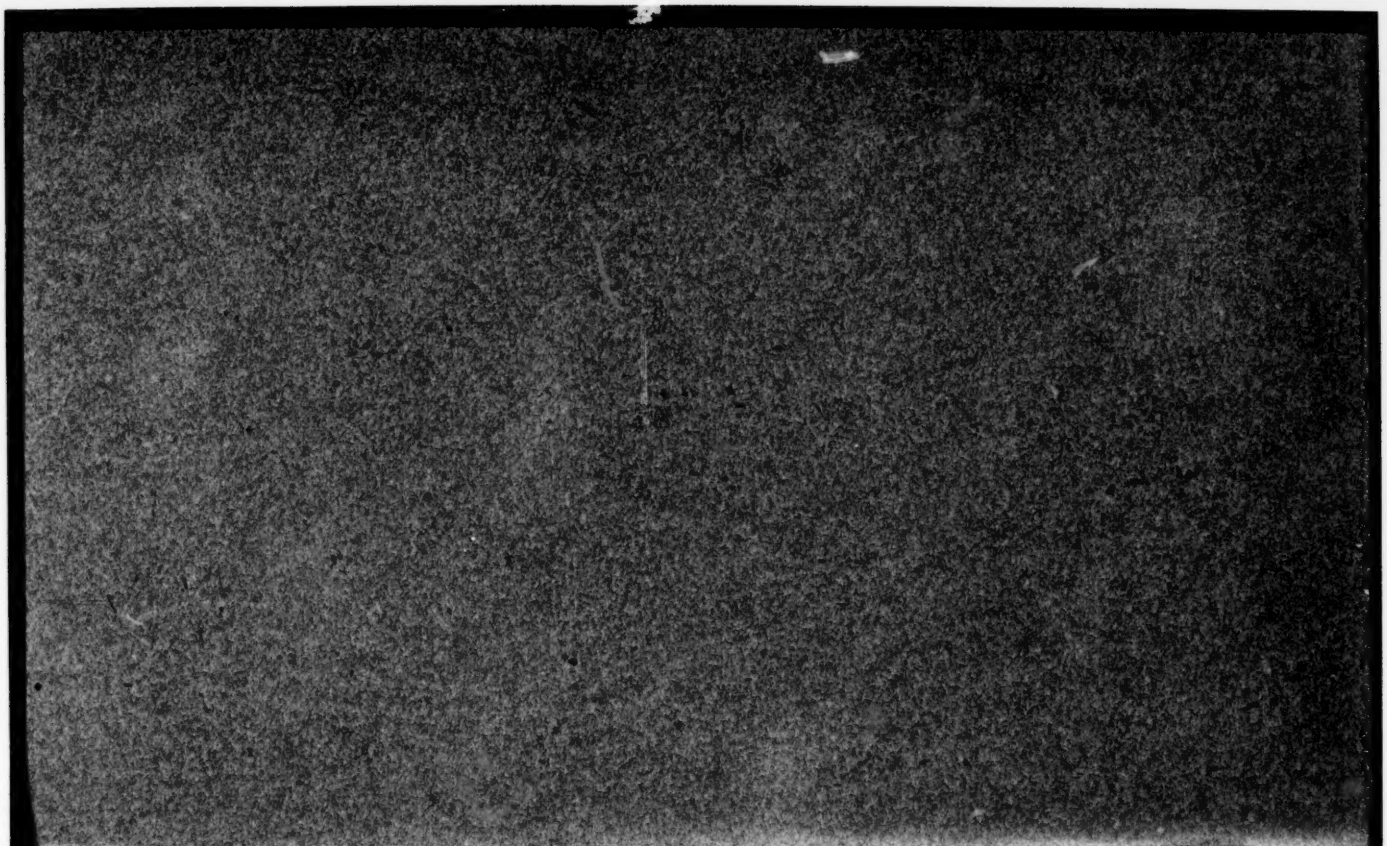
vs.

DAVID N. COMINGORE.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF KENTUCKY.

FILED AUGUST 8, 1899.

(17,484.)



(17,484.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 370.

JOHN T. BOSKE, SHERIFF OF KENTON COUNTY, KENTUCKY, APPELLANT,

vs.

DAVID N. COMINGORE.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF KENTUCKY.

INDEX.

	Original.	Print.
Caption	1	1
Petition for writ of *habeas corpus*	1	1
Exhibit "A"—Opinion and judgment on rule	7	5
"B"—Regulations of Commissioner of Internal Revenue	12	8
"C"—Order of commitment	14	9
Writ of *habeas corpus*	15	10
Marshal's return	15	10
Decree	16	10
Return of John T. Boske	17	11
Opinion	23	16
Order filing bill of exceptions	41	28
Bill of exceptions	41	28
Order filing petition for appeal, &c	42	29
Petition for appeal	42	29
Assignment of errors	43	30
Appeal bond	44	30
Clerk's certificate	46	31
Citation	47	32
Acceptance of service	48	32

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., AUGUST 23, 1899.

1 Proceedings of the district court of the United States for the district of Kentucky, at a regular term begun and held at the Federal court hall, in the city of Louisville, on Monday, February 20th, A. D. 1899.

Present: Hon. Walter Evans, U. S. district judge.

In re DAVID N. COMINGORE, *Ex Parte.*

Be it remembered that heretofore, to wit, on the 28th day of June, A. D. 1899, came the petitioner herein, David N. Comingore, by R. D. Hill, his attorney, and filed his petition and exhibits herein, and on his motion it is ordered that a writ of *habeas corpus* do issue forthwith directed to the sheriff of Kenton county.

The petition above referred to is as follows:

To the Hon. Walter Evans, judge of the United States district court within and for the district of Kentucky:

Your petitioner, D. N. Comingore, respectfully says that he is a citizen of Kenton county, Kentucky, and that he is now unlawfully and unjustly detained and imprisoned by John T. Boske, sheriff of Kenton county, Kentucky, by virtue of an order of the Carroll county *county*, in the State of Kentucky; he further says that on March 1st, 1899, his deposition was, pursuant to notice, taken at his office, in the city of Covington, Kenton county, Kentucky, by and before W. A. Price, a duly appointed, qualified, and acting notary public within and for Kenton county, Kentucky, to be read as evidence in behalf of the plaintiff in the case of The Commonwealth of Kentucky, plaintiff, against Elias Block & Sons, defendants,
2 pending in said Carroll county court. Your petitioner further states that when his said deposition was taken he was and still is collector of the United States internal revenue for the sixth collection district in the State of Kentucky, and the said Block & Sons were then and since October 11th, 1885, had been and still are distillers and manufacturers of whisky in said district, and during said time had and still have a bonded warehouse at their distillery, which, during said time, has been and is located in Carroll county, Kentucky, in which all whisky manufactured by them during said time had been warehoused, and at the time said deposition was taken the warehouse had in it all whisky that had been manufactured by said Block & Sons that had not theretofore been withdrawn by them for consumption; that the said case of The Commonwealth of Kentucky against Block & Sons was and is a proceeding that was instituted in said Carroll county court at the instance of and by the Kentucky State revenue agent within and for Carroll county, Kentucky, under and by virtue of section 4241 of Kentucky Statutes, for the purpose, among other things, of ascertaining the exact amount and value of whisky that said Block & Sons had in said warehouse subject to taxation by and under the laws of Kentucky for each of the years from October 1st, 1885, to July 1st, 1897, in order that it might be

determined whether said Block & Sons had, during said time, listed all of said whisky with the State assessor of said Carroll county for State and county taxation; and, if not, that they might now be charged with and forced to pay to said State and county any and all taxes on so much of said whisky as has not theretofore been listed for taxation; that your petitioner was duly sworn before giving his said deposition, and, after being sworn, the following questions, among others, were propounded to him by the counsel for the plaintiff in said case, to each of which he made the answers just following each question:

3 "3. Did the defendants, Block & Sons, owners of said distillery, make, under the provisions of the laws of the United States, reports to your office as to the amount of liquor which they manufactured and deposited in the bonded warehouses located on said distillery premises from the year 1887 down to the present time? If so, how often under the provisions of the law do they make such reports?

"A. They make reports monthly.

"4. Did they, under the provisions of said law, also make applications to your office during said time for permission to withdraw such liquors from bond? If so, how often?

"A. They make applications whenever withdrawals are made; daily if they choose.

"5. Are these reports of deposits and requests for privilege to withdraw, or official records made therefrom, now in your office, or under your control in any way, for the period commencing October 1, 1885, and ending July 1st, 1897?

"A. They are on the files of this office, but not under my control, except as collector.

"6. Please file official copies of them and make them a part of your deposition.

"A. I will have to decline to do this under sec. 3167 of the Revised Statutes of the United States and the rulings of the department.

"7. What rulings of the department do you refer to other than sec. 3167 of the Statutes?

"A. The ruling of the department is as follows:

"'The department does not permit the giving out of anything contained in internal-revenue returns or documents by a collector, storekeeper, or any other officer of a collection district for purposes other than those which the Statutes of the United States contemplate.'

"8. Who made that ruling of the department?

"A. It is made by the Secretary of the Treasury, through the Internal Revenue Commissioner."

Your petitioner further states that at the time said questions were propounded to and answered by him and at the time he refused to file as part of his deposition copies of the papers mentioned in said question "5" there was on file in his office at Covington, Kentucky, all of said papers, but they were and are public documents in his possession as said collector and owned by the United States, and

that he as an individual had no possession or control over them or any of them, and that he refused to file copies of same as part of his deposition under and by virtue of a regulation that was made and issued by the Secretary of the Treasury and Commissioner of Internal Revenue, of date August 3rd, 1896, copy of which is filed herewith as part hereof, marked "A." Your petitioner further states that when he refused to file and make a part of his deposition the official copies of the reports made to his office by Block &
4 Sons as to the amount of liquor which they manufactured and deposited in bonded warehouses located on their distillery premises, or copies of the official records made therefrom, for the period commencing October 1st, 1885, and ending July 1st, 1897, and official copies of requests for privilege to withdraw such liquor from bond, or copies of the official records made therefrom, for the same period referred to in question "5" of the aforesaid deposition, for the reasons stated in the answers to said questions "5" and "6" and subsequent answers in said deposition, he was, by the said W. A. Price, notary public aforesaid, adjudged to be in contempt of court and of said notary public for his said failure and refusal to file said copies and make them a part of his deposition; and it was further adjudged by the said W. A. Pri , notary public aforesaid, that the Commonwealth of Kentucky then and there recover of your petitioner the sum of five dollars ($5.00) as a fine, and that your petitioner be taken by the sheriff of Kenton county and confined in the jail of said county for the space of six hours, or until he was willing to furnish said copies or permit access to the records of his office in order that information might be obtained to be used as evidence in said case. He further says that the action of said Price, notary public aforesaid, and the reason therefor in adjudging your petitioner to be in contempt of court on account of his failure and refusal aforesaid to pay said fine, and to be confined in jail as aforesaid, was by said W. A. Price, notary public, as aforesaid, reported to said Carroll county court, as provided by section 538, Kentucky Civil Code of Practice, and the said Carroll county court, on the 3rd day of April, 1899, by order duly made and entered, approved the judgment and action of said Price, and your petitioner was by said county court, for his failure and refusal to file said copies and make them a part of his deposition, as aforesaid, adjudged to be in contempt of said court, and to pay a fine of five dollars, and was ordered by said court to be committed for contempt, copy of which order is filed herewith as part hereof, marked "B."

5 Your petitioner further states that after said order was entered in and by said county court, to wit, on June 27, 1899, the attorney for the plaintiff in said county court case and the said notary public, W. A. Price, appeared at his, the collector's, office in Covington, Kentucky, and thereupon and in pursuance to said order of the said county court the said attorney, in the presence of the said Price, notary public, propounded to your petitioner the following question:

"I call your attention to the opinion of the court rendered April 3rd, 1899, copy of which has been furnished you and as to which

you have had ample time to be advised fully, and now ask if you will file official copies of such reports of the United States storekeepers, spoken of at the time of the former taking of your deposition, as show the amount of liquor on hand at the warehouses of the defendants on their distillery premises in Carroll county, Ky., on September 15, 1890, Sept. 15, 1891, Nov. 15, 1892, Sept. 15, 1893, Sept. 15, 1894, and Sept. 15, 1895, and Sept. 15, 1896, or allow us on behalf of the plaintiff in this action access to and inspection of such records or papers for the purposes of taking copies for use on behalf of the plaintiff as evidence in this action."

To which question your petitioner made the following answer:

Answer. "I will have to decline, just as I did in the other case, and for the same reason as given in the other case."

And thereupon your petitioner was by said notary public, W. A. Price, again adjudged to be in contempt of said county court and said officer, W. A. Price, and it was adjudged by said Price that the Commonwealth of Kentucky recover of your petitioner the sum of five dollars as a fine, and that he be taken by the sheriff or some constable of Kenton county and confined in the jail of said county for the space of six hours or until he shall signify his willingness to purge himself of the said contempt and testify and give
6 the information from the records and documents under his control and in his custody as collector of internal revenue of the United States for the sixth district of Kentucky or allow an inspection of his records for the purpose of obtaining such information for use as evidence in said action of The Commonwealth of Kentucky *vs.* L. T. Block *et al.* in said county court, and the said W. A. Price then and there issued and delivered to the said John T. Boske, sheriff of Kenton county, Ky., a written order of commitment, which is filed herewith as part her-of, marked "C;" and thereupon the sheriff arrested your petitioner and your petitioner is now in the custody of said sheriff, and he is unlawfully detained, imprisoned, and deprived of his liberty under and upon the judgment of the aforesaid Carroll county court in said case and under and by virtue of said order of commitment issued by said W. A. Price, N. P. Your petitioner further states that the records of deposits of liquor in bond and requests to withdraw liquor from bond and official records made therefrom from the period commencing October 1, 1895, and ending July 1, 1897, were privileged, and for that reason and because of the said regulations of the Secretary of the Treasury and the Commissioner of Internal Revenue made conformably to law he could not legally and he ought not to be required to testify as to the contents of the said record or to file official copies of same or to permit access to same.

Wherefore, to be relieved and discharged of said unlawful detention and imprisonment, your petitioner prays for writ of *habeas corpus*, to be directed to John T. Boske, sheriff of Kenton county, Kentucky, to be issued in this behalf, so that your petitioner may be brought before this honorable court, to do and to submit and to receive what the law may direct.

DAVID N. COMINGORE.

Subscribed and sworn to before me this 27th day of June, 1899.

JOS. C. FINNELL,
Clerk U. S. Courts,
By L. M. VAN DYKE, *D. C.*

7 EXHIBIT "A."

Regular April Term, April Third, 1899.

Carroll County Court, District of Kentucky.

COMMONWEALTH OF KENTUCKY, Plaintiffs,
vs.
ELIAS BLOCK & SONS, Defendants.

Opinion and Judgment on Rule.

Without undertaking to recite all the facts preliminary to and leading up to this motion for a rule against D. N. Comingore, collector of internal revenue of the sixth district of Kentucky, it is deemed sufficient to state that this proceeding was pending to enforce the proper assessment and payment of State and county taxes on a large amount of whisky belonging to the defendants in their bonded warehouses at Prestonville, in this county, under the revenue laws of the State, and which it is claimed by the plaintiff the defendants had failed to assess or pay taxes on. The plaintiff claims that about the only legal proof touching the amount of whisky which defendants had on hand at the dates and time mentioned in its statement are certain applications, reports, etc., made by defendants and reports made by U. S. storekeepers or other U. S. officials in charge of the bonded warehouses and liquors stored therein, which reports, &c., are now in the possession of the said Comingore, as U. S. internal-revenue collector of the 6th district of Kentucky, at Covington, and on the 1st day of March, 1899, it proceeded to take his deposition to be read as evidence in this proceeding, and during the taking of said deposition the witness Comingore was asked by plaintiff's counsel to file official copies of certain reports of the defendants Block and Sons made to said collector's office "as to the amount of liquor which they manufactured and deposited in the bonded warehouses" on the distilling premises at Pres-
8 tonville, Carroll county, Ky., "from the year 1887 down to the present time," and also copies of certain "application made to your (his) office during said time for permission to withdraw such liquors from bond," which reports and applications the witness admits "are on the files" of the collector's office and under his control as collector; but he refuses to furnish said copies for the reason that he is not allowed to do so "under sec. 3167 of the Revised Statutes of the United States and the rulings of the department."

The notary, before whom the depositions were being taken, ruled that the witness by refusing to answer and furnish said copies was

in contempt, and adjudged that he be fined and imprisoned until he signified a willingness to comply with the request and file copies of said papers, and he certified his rulings to this court for such action as it might deem proper in the premises.

No response other than an oral response is made by or for the witness in this court and no defense offered except such as is claimed by him in answer to the questions propounded to him in the deposition—that is, that he declines to answer or furnish copies of the papers desired, (1) under sec. 3167 of the Revised Statutes, and (2) under the rulings of the department. In the hearing before this court it was not contended that there was any express statute of the United States that exempted the witness from giving the information or testimony desired, but that there was a regulation of the Treasury Department which forbids collectors of internal revenue from "the giving out of anything contained in internal-revenue returns or documents by a collector, storekeeper, or any other officer of a collection district for purposes other than those which the statutes of the United States contemplate," and that this rule or regulation of the department has the force and effect of a general law, not only to those under the control and direction of the department, but to all persons, and places such papers beyond the reach of the courts as testimony in any civil or criminal case or proceeding. Two cases are cited by counsel for respondent in support of this contention, *In re* Huttman, 70 Fed. Rep, 699, and *In re*
9 Weeks, 82 Fed. Rep., 730, and these cases are very persuasive of their views of the question and lean strongly in the direction, if they do not hold, that a rule or regulation of any department of the General Government has the force of an act of Congress. This seems to me to be an extreme view of the authority of the General Government in any of its departments and an invasion by the executive branch of the Government upon the rights and privileges and jurisdiction of the judicial.

On the other hand, we have the case of *In re* Hirsch, 74 Fed. Rep., 928, in which a question very similar, if not identical, with the one at bar before this court for adjudication was passed upon, and — learned judge in his opinion in reference to such a regulation says, "While they are entitled to respectful consideration, they neither authoritatively declare general principles nor establish general rules in regard to the subject of obedience to the orders of a court in the matter of evidence," and that they "have the force of a statute" only "in regard to the assessment of the internal revenue." In the case of Flemming *vs.* Stahl, 83 Fed. Rep., 943, in commenting upon the authority of the President and Civil Service Commission to make rules or regulations, the learned judge reaches the conclusion that "the President may make rules and regulations administrative in their nature, which would govern the policy of his administration," * * * but they "could not have the force and effect of law, nor would the courts enforce them."

After a careful reading of these several cases and an examination of such other authorities as were at hand, I am unable to conclude that in a Government such as ours, as intimately connected and re-

lated as the several States and the General Government are and ought to be, and the mutual interest subsisting between them in regard to the faithful and proper enforcement of all the laws of each, which are consistent with their respective constitutions, it could be the purpose of either to deliberately by its policy or legislation or regulations to thwart, impede, or hinder the due execution of the laws of the other. The State has as much right as the Gen-
10 eral Government to collect the revenue due it. It is not denied that the General Government has the same right to collect its revenue; but has it the right in doing so to step in through its officials between the State and its tax-payers and say you shall not have access to the property itself to list it for taxation, nor shall you, through the courts or otherwise, have the right to the records in the U. S. revenue office as evidence to establish the amount of property owned by a tax-payer and liable to State taxation?

On the rule before me in relation to the contempt, I therefore enter the following as the judgment of the court:

It is therefore ordered and adjudged by the court that the plaintiff's motions be sustained and that plaintiff is entitled to use as evidence the facts stated in the reports and papers filed by any or all of the defendants in the office of the collector of internal revenue for the sixth district of Kentucky, and also such facts as are stated in the reports made to said office by certain officers known as United States storekeepers, and any other similar records, papers, documents, or exemplifications in said office tending to show the amount of liquors on hand at the distillery of the defendants on the 15th day of Sept., 1889, 1890, 1891, 1893, 1894, 1895, 1896, and on the 15th day of November, 1892; it is further ordered that the witness, D. N. Comingore, make or cause to be made or permit the plaintiff, its agent or attorneys, to make true copies of such of said papers as the plaintiff or its attorneys may demand, and that said Comingore, as collector, attest the same and attach his seal of office thereto, if he has such seal, and that he permit the plaintiff or its agents or attorneys to compare said copies with the originals and verify same, and that he shall also testify further in regard to same, if demand be made, and leave is hereby given to complete the taking of said deposition on giving proper notice, and for this purpose the clerk is directed upon request of plaintiff's attorneys to transmit said deposition as now on file to W. A. Price, notary public, Covington, Ky.

It is further adjudged that the action of the notary public,
11 Price, in adjudging the witness, D. N. Comingore, to be in contempt for failure to file copies of reports, papers, documents, and exemplifications or to testify as to their contents, as requested, be sustained and affirmed, and that the Commonwealth of Kentucky recover of said D. N. Comingore the sum of five dollars as a fine, and that he be taken by the sheriff of Kenton county, Kentucky, and confined in the jail of said county for the space of six hours, or until he signifies his willingness to comply with the request made in the deposition attempted to be taken, as follows:

Please file official copies of the reports made to your office by Block & Son as to the amount of liquor which they manufactured

and deposited in the bonded warehouses located on their distillery premises from the year 1887 down to the present time, and also official copies of applications made by them to your office during said time for permission to withdraw such liquors from bond.

Also with the following request:

Please file official copies of such reports of the United States storekeepers as show the liquors on hand at the warehouses on the distillery premises of the defendants in Carroll county on September 15th, 1890, Sept. 15th, 1891, Nov. 15, 1892, Sept. 15, 1893, 1894, 1895, and 1896.

To all of which the defendants except.

The clerk of the court is ordered and directed to make out attested copies of this judgment and order and forward same to the sheriff of Kenton county, Ky., and W. A. Price, notary public, as warrant and authority for the enforcement thereof, to which the defendants also except.

A copy.

Attest:

A. J. BRUCE, *Clerk*,
By W. DEATHERAGE, *D. C.*

12 EXHIBIT "B."

Series 7, No. 12. Revised August 3, 1896. Supplement No. 1.

Regulations prohibiting the giving out by collectors of records in their offices or copies thereof for purposes not contemplated by the internal-revenue laws.

TREASURY DEPARTMENT,
OFFICE OF THE COMMISSIONER OF INTERNAL REVENUE,
WASHINGTON, D. C., *April* 15, 1898.

The following regulations are issued as supplementary to the instructions and suggestions contained on pages 41 and 42 of the regulations, series 7, No. 12, revised August 3, 1896:

All records in the offices of collectors of internal revenue or of any of their deputies are in their custody and control for purposes relating to the collection of the revenues of the United States only. They have no control of them and no discretion with regard to permitting the use of them for any other purpose.

Collectors are hereby prohibited from giving out any special-tax records or any copies thereof to private persons or to local officers, or to produce such records or copies thereof in a State court, whether in answer to *subpœnas duces tecum* or otherwise.

Whenever such subpœna shall have been served upon them they will appear in court in answer thereto and respectfully decline to produce the records called for on the ground of being prohibited therefrom by the regulations of this department.

The information contained in the records relating to special-tax payers in the collector's office is furnished by these persons under compulsion of law for the purpose of raising revenue for the United States, and there is no provision of law authorizing the sending out

of these records or of any copies thereof for use against the special-tax payers in cases not arising under the laws of the United States. The giving out of such records or any copies thereof by a collector in such cases is held to be contrary to public policy and not
13 to be permitted.

As to any other records that those relating to special-tax payers, collectors are also forbidden to furnish them or any copies thereof at the request of any person. Where copies thereof are desired for the use of parties to a suit, whether in a State court or in a court of the United States, collectors should refer the persons interested to the following paragraph in rule X of the rules and regulations of the Treasury Department, namely:

In all cases where copies of documents or records are desired by or on behalf of parties to a suit, whether in a court of the United States or any other, such copies shall be furnished to the court only and on a rule of the court upon the Secretary of the Treasury requesting the same.

Whenever such rule of court shall have been obtained collectors are directed to carefully prepare a copy of the record or document containing the information called for and send it to this office, whether upon it will be transmitted to the Secretary of the Treasury, with a request for its authentication, under the seal of the department, and transmission to the judge of the court calling for it unless it should be found that circumstances or conditions exist which make it necessary to decline in the interest of the public service to furnish such a copy.

N. B. SCOTT,
Commissioner.

Approved:
L. J. GAGE,
Secretary of the Treasury.

14 EXHIBIT "C."

The Commonwealth of Kentucky to the sheriff or any constable of Kenton county:

D. N. Comingore, being examined as a witness by deposition before me, as a notary public, for the purpose of using his testimony on the trial of a certain action pending in the Carroll county court, in which The Commonwealth of Kentucky is plaintiff and Louis T. Block *et al.* are defendants, and having been adjudged guilty of contempt of said court in refusing to answer certain questions then asked him and to give information as to the amount of distilled liquors in the custody of the defendants in said action at certain times, as shown from the records, documents, and reports on file in his office and under his control as collector of internal revenue for the United States for the sixth district of Kentucky, or to allow an inspection of his records for the purpose of obtaining such information for use as evidence in said action, as shown by certified copies of the order and judgment of said court hereto attached as

part hereof, as well as the action had and recorded by me in the taking of said depositions:

These are therefore to command you to take the body of the said D. N. Comingore and him safely keep or confine him in the jail of Kenton county for the space of six hours and until he shall satisfy the Commonwealth of Kentucky the sum of $5.00 adjudged against him for contempt or until he shall signify his willingness to purge himself of the said contempt and testify and give information from the records and documents under his control and in his custody as collector, as aforesaid, and how you shall have executed this writ you will make known to me at my office, in Covington, Ky., or the judge of the Carroll county court, at his office, at Carrollton, Carroll county, Ky., and with such return produce this writ.

Witness my hand and seal of office as notary public for Kenton county, Kentucky, this 27th day of June, 1899.

[SEAL.] W. A. PRICE, *N. P., Ky.*

My commission expires Jan'y 25, 1900.

15 The writ of *habeas corpus* above referred to is as follows:

The President of the United States of America to the sheriff of Kenton county, Greeting:

You are hereby commanded to produce forthwith the body of David N. Comingore before the judge of the district court of the United States for the Kentucky district, at Louisville, illegally detained by you, as alleged, together with the nature and cause of his detention, then and there to abide by such order as shall be made in the premises, and have then and there this writ; and this you shall in nowise omit, under the penalty in such case denounced.

[SEAL.] Witness the Honorable Walter Evans, judge of the district court of the United States, at Louisville, in said district, this 28th day of June, 1899, and of the Independence of the United States the 123rd.

THOS. SPEED, *Clerk,*
By HENRY F. CASSIN, *D. C.*

Upon which the marshal made the following return:

I hereby certify that I received this writ on the 28th day of June, 1899, and that I have personally executed the same by delivering a true copy of this writ to John Boske, sheriff of Kenton county, Ky., on the 28th day of June, 1899. This therefore returned executed as the law directs this 30th day of June, 1899.

A. D. JAMES,
U. S. Marshal,
By J. D. COMPTON, *Deputy.*

16 And on the 5th day of July, 1899, the respondent, John T. Boske, made his return in writing to the writ of *habeas corpus* herein. He also produced in court the body of the relator.

And thereupon the relator, by R. D. Hill, his counsel, moved the court for judgment of discharge upon the writ and the return thereof;

to which the respondent, by H. M. Winslow, his counsel, objected; and the matters of law arising on said motion having been argued by said counsel, and the court, being fully advised thereof, delivered a written opinion, which is ordered to be filed and made a part of the record, and in accordance therewith it seems to the court the law is for the relator.

It is further considered by the court that the imprisonment and detention of the relator by the respondent is in violation of the Constitution and laws of the United States. It is therefore ordered that the relator be discharged of the premises, and that he go hence without day.

It is further considered by the court that the said David N. Comingore, the relator, recover of the said John T. Boske, the respondent, his costs in and about this writ herein expended.

On motion of John T. Boske, the respondent, by his counsel, it is ordered that he do have until and including July 8th, 1899, to prepare and file a bill of exceptions herein.

17 The return of John T. Boske, above referred to, is as follows:

To the Hon. Walter Evans, judge of the United States district court within and for the district of Kentucky:

In the Matter of D. N. COMINGORE on Proceedings for *Habeas Corpus.*

The undersigned, John T. Boske, sheriff of Kenton county, Ky., for response and return to the writ of *habeas corpus* served on him herein, says he has in his custody the said D. N. Comingore, whom he brings before your honor as directed by the writ, and for the cause and time of his detention and imprisonment says that under warrant of commitment from W. A Price, as notary public for Kenton county, Ky., of date June 27th, 1899, and under order and judgment of the Carroll county court attached thereto, and copies of which are hereto attached, he, on June 27th, 1899, took said Comingore into his custody for contempt of the Carroll county court and of said W. A. Price, as notary public for Kenton county, Ky., while engaged in taking the deposition of said Comingore, to be read as evidence in an action pending in the Carroll county court styled Commonwealth of Kentucky, &c., *vs.* L. T. Block, &c.

Respondent says that on June 27th, 1899, additional proceedings to these set forth in the petition herein were taken before said Price, as follows:

Having resumed the foregoing deposition of D. N. Comingore, the taking of which was commenced before me on March 1st, 1899, and the notice attached hereto for the continuance thereof on this the 27th day of June, 1899, and a copy of the order of the Carroll county court in the same matter of date April 3rd, 1899, the taking of said deposition is now resumed under said notice and order of court at the same time and place and for the same purpose as stated in the original caption.

(Signed) W. A. PRICE,
N. P., Kenton Co., Ky.

18 By ATTORNEY FOR PLAINTIFF:

Q. 23. I call your attention to the opinion of the court rendered April 3rd, 1899, copy of which has been furnished you and as to which you have had ample time to be advised fully, and now ask if you will file official copies of such reports of the United States storekeepers, spoken of at the time of the former taking of your deposition, as shown the amount of liquors on hand at the warehouses of the defendants on their distillery premises in Carroll county, Ky., on Sept. 15th, 1890; Sept. 15th, 1891; Nov. 15th, 1892; Sept. 15th, 1893; Sept. 15th, 1894; Sept. 15th, 1895; Sept. 15th, 1896, or allow us on behalf of the plaintiff in this action access to and inspection of such records or papers for the purpose of taking copies for use on behalf of the plaintiff as evidence in this action.

Ans. I will have to decline just as I did in the other case and for the same reason as given in the other case.

Q. 24. Please examine the records and reports under your control and in your custody as collector and state what amount of liquors were contained in the warehouses owned by the defendants in Carroll county on the following dates: Sept. 15th, 1890; Sept. 15th, 1891; Nov. 15th, 1892; Sept. 15th, 1893; Sept. 15th, 1894; Sept. 15th, 1895, and Sept. 15th, 1896.

Ans. I decline to answer for the same reasons as stated before.

The witness, D. N. Comingore, declining and refusing to testify and answer the questions or allow the taking of the information from the records of his office, and the Carroll county court having, upon report to him of the matter under the taking on the 1st day of March, 1899, decided and adjudged such refusal to be contempt of said court, of which the said witness has due information, he is now again adjudged in contempt of said court and that the Commonwealth of Kentucky recover of him the sum of five dollars as fine, and that he be taken by the sheriff or some constable of Kenton county and confined in the jail of said county for the

19 space of six hours or *or* until he shall signify his willingness to purge himself of the said contempt and testify and give the information from the records and documents under his control and in his custody as collector of internal revenue for the United States for the sixth district of Kentucky, or allow the inspection of his records for the purpose of obtaining such information for use as evidence in the action wherein The Commonwealth of Kentucky is plaintiff and Louis T. Block *et al.* are defendants, pending in the Carroll county court, and pending such further proceedings as may be taken in the matter and subject to the reopening of the deposition for the purpose of the completion thereof, he is requested and required to sign the same.

(Signed) W. A. PRICE,
Notary Public, Kenton Co., Ky.
D. N. COMINGORE.

Upon the conclusion of which proceedings, by directions of said Price, as notary public, under the said warrant of commitment and

judgment of said Carroll county court, he took said Comingore into custody for contempt of said court, and so holds him in custody.

Respondent respectfully begs to further show and states that during the progress of said action, in order to conform to any reasonable rules and regulations of the executive department of the United States as to mode and manner of reaching said evidence and conform- thereto for the convenience of the officers thereof, the plaintiff in said proceeding, by its attorneys representing it therein, wrote to Hon. Lyman J. Gage a letter, of date Aug. 2nd, 1897, reading as follows:

CARROLLTON, KY., *Aug. 2nd*, 1897.

"Hon. Lyman J. Gage, Secretary of the Treasury, Washington, D. C.

DEAR SIR: Please refer to your letter to us of date June 29th, 1897, your number 16005A/42 Ek, in reference to our obtaining certain information from the collector of internal revenue, to be used as evidence in the trial of an action wherein The State of Kentucky is plaintiff and certain distillers are defendants. The action is one in which the State is seeking to assess liquors in U. S. bonded warehouses, and which the defendants have failed, neglected, and refused to list for regular State and county taxation. The collector's office contains papers which will show absolutely the true amount of liquors on hand at the proper date for assessment, as well as other revelant evidence. Under our statute copies of these records or documents, duly attested and certified, are competent evidence.

We are not seeking information upon which to base a suit, but are seeking testimony. By referring to your file number, 15068A/40 EK, you will find a letter to your predecessor, Mr. Carlisle, written by us, and also a copy of his reply, dated December 17, 1896. We have filed an affidavit of the character referred to in the letter of Mr. Carlisle and asked for a rule to be awarded requesting you to furnish the desired information and evidence, consisting of copies of certain records and documents from the collector's office at Covington, Ky.

The motion for the rule is now pending, defendants' counsel objecting to its issuance, stating that the Secretary is not permitted to furnish such information under any circumstances. The court has taken time upon the matter until August 16th. We are proceeding strictly under rule XII of your department, and it seems to us we are clearly entitled to the desired evidence under that rule, and that was evidently the opinion of your predecessor, Mr. Carlisle. In our opinion the collector could not refuse to testify as a witness in this regularly instituted proceeding. It is true we are not pursuing the exact line mapped out in Mr. Carlisle's letter, for we have not summoned the collector to appear to testify, and he has not appeared 'with the United States attorney.' We have waived that part of the matter, not desiring to cause that trouble and expense, but we have filed the required affidavit.

It does seem to us that the United States Governement ought not to assist persons in defrauding the State government out of taxes

justly due it, but that it should be willing to assist a State in collecting its just dues, especially so when the agent of the United States carries the keys to the buildings in which the property sought to be taxed is located and no one can enter the building without his consent.

Is it not a fact that we are properly following rule XII of your department in this matter, and that you will furnish copies of the records or documents in said office to the court 'upon a rule of the court requesting the Secretary of the Treasury to furnish the same'?

If this is not the correct practice, can you inform us what is the correct practice to obtain this evidence from said office, or do you hold that such evidence cannot be obtained in any way? If such is your view, it is certainly contrary to that of Mr. Carlisle, as shown by his letter formerly referred to herein, a copy of which is doubtless on file in your office.

A reply at your early convenience will greatly oblige,

Yours very truly,

(Signed) WINSLOW & WINSLOW."

To which letter the said Gage made reply as follows:

"16005A
42 Ek.

TREASURY DEPARTMENT,
OFFICE OF THE SECRETARY,
WASHINGTON, D. C., *August* 13, 1897.

Messrs. Winslow & Winslow, attorneys-at-law, Carrollton, Kentucky.

GENTLEMEN: I have to acknowledge the receipt of your letter of the 2nd inst., in which you refer to a letter of my predecessor, dated December 17, 1896, in regard to furnishing certified copies of the records in this department.

21 Rule XII prescribes that when the parties to a suit desire copies of the records copies will be furnished to the court only upon a rule of the court requesting the Secretary to furnish the same. This is a general rule, to be applied within the discretion of the Secretary. It was not intended that the Secretary would furnish the copies in every case in which the application was made. Each application is considered when presented, and granted or refused as the circumstances may warrant.

In the Secretary's letter of December 17, 1896, this limitation is not stated, and you were probably led to the conclusion that after you procured the order of the court the copies requested would be furnished.

You seek information in the office of the collector of internal revenue 'which will show absolutely the true amount of liquors on hand at the date of assessment' for State taxes.

It has been the uniform practice of the department to decline to furnish information of this character from the records of the in-

ternal-revenue office, and I am not disposed to reverse the practice even upon a rule of court requesting it.

Respectfully yours,

(Signed) L. J. GAGE, *Secretary.*
L. J."

For which it is shown that the only resource left the plaintiff was the proceeding taken against the said Comingore requiring him to testify under the order of the said Carroll county court and said notary public.

Respondent says that sec. 3167 of Rev. Stat. of the United States has no application to the question in controversy, and that the Secretary of the Treasury and the Commissioner of Internal Revenue are executive and not legislative officers of the Government, and under the Constitution have no authority to make laws or any rules or regulations to have such effect, except upon their subordinates, with regard to their relations as officers with the Government, and that such must be made conformably to the law of the land upon the subject of evidence and cannot be of any force as between the States or the States and citizens or tax-payers to alter, change, or effect the law regularly accepted or adopted by the Government or enacted by the regular legislative authorities, nor are the facts sought to be elicited from the records and documents as evidence and pertinent to the issue involved in any sense "State secrets" or "privileged communications" in contemplation of law as heretofore adjudged by those appointed under authority to exercise judicial functions in this Government (*In re* Hirsch,
22 74 Fed. Rep., 928; Fed. Rep., 1005), and to sustain the witness and direct him to be discharged from custody would be to allow him, upon whom alone executive functions devolve in the discharge of the duties of his office, to be judge of the law as against the regular elected county judge of the State county court, and to uphold a law attempted to have been enacted by another merely executive officer of the Government, and thus both legislative and judicial functions be usurped by the executive officers; and respondent submits the question to your honor and the courts regularly appointed under the law of the United States for the exercise of judicial functions, and asks that the writ against him be discharged.

JOHN T. BOSKE,
Sheriff Kenton Co., Ky.

WINSLOW & WINSLOW,
Att'ys for Respondent.

Subscribed and sworn to before me as clerk of the Kenton circuit court this 1st day of July, 1899.

W. E. MILLER,
Clerk Kenton Cir. Ct.,
By H. S. BEMIFORDE,
D. C. Kenton Cir. Ct.

The copies referred to and attached to said return and made part thereof read the same as Exhibit- A and C, respectively, filed with the petition and heretofore copied in this transcript.

23 United States District Court, District of Kentucky.

In re DAVID N. COMINGORE, Petitioner.

Opinion.

The petitioner for the writ of *habeas corpus* in this case is the collector of internal revenue for the sixth district of Kentucky, duly appointed and commissioned by the President of the United States. Previous to March 1, 1899, the auditor's agent, claiming that Elias Block & Sons, distillers, had failed to list for State taxation certain distilled spirits in their warehouse in Carroll county, Kentucky, instituted civil proceedings against them in the name of the Commonwealth of Kentucky under the provisions of sec. 4241 of the Kentucky statutes to compel an assessment of the spirits for taxation. On that day the petitioner, in obedience to a subpœna, appeared as a witness to give his deposition in the case before W. A. Price, a notary public.

After being duly sworn he was asked several questions to which he made answers as follows:

"3. Did the defendants, Block & Sons, owners of said distillery, make, under the provisions of the laws of the United States, reports to your office as to the amount of liquor which they manufactured and deposited in the bonded warehouses located on said distillery premises from the year 1887 down to the present time; if so, how often under the provisions of the law do they make such reports?

"A. They make reports monthly.

"4. Did they, under the provisions of said law, also make applications to your office during said time for permission to withdraw such liquors from bond; if so, how often?

"A. They make applications whenever withdrawals are made. Daily, if they chose.

"5. Are these reports of deposits and requests for privilege to withdraw, or official records made therefrom, now in your office or under your control in any way for the period commencing October 1, 1885, and ending July 1st, 1897?

"A. They are on the files of this office, but not under my control except as collector.

"6. Please file official copies of them and make them a part of your deposition.

"A. I will have to decline to do this, under sec. 3167 of the Revised Statutes of the United States and the rulings of the department.

24 "7. What rulings of the department do you refer to other than sec. 3167 of the statutes?

"A. The ruling of the department is as follows:

"'The department does not permit the giving out of anything contained in internal-revenue returns or documents by a collector,

storekeeper, or any other officer of a collection district for purposes other than those which the statutes of the United States contemplate.'

"8. Who made the ruling of the department?

"A. It is made by the Secretary of the Treasury through the Internal Revenue Commissioner."

For failing to answer some of the questions in the manner desired and for failing to furnish the official copies demanded the notary public then adjudged that the petitioner should pay a fine of $5.00 and be confined in the county jail for six hours, or until he was willing fully to answer the questions and furnish the copies.

This judgment of the notary public was *per se* ineffective under sec. 538 of the Kentucky Code of Practice, and had to be reported to the court in which the litigation is pending, the code requiring that the court shall render judgment for the fine imposed to the extent it is approved.

The notary reported this action to the county court, by which it was approved and judgment entered in the following form:

"It is therefore ordered and adjudged by the court that the plaintiff's motions be sustained and that plaintiff is entitled to use as evidence the facts stated in the reports and papers filed by any or all of the defendants in the office of the collector of internal revenue for the sixth district of Kentucky, and also such facts as are stated in the reports made to said office by certain officers known as United States storekeepers, and any other similar records, papers, documents, or exemplifications in said office tending to show the amount of liquors on hand at the distillery of the defendants on the 15th day of Sept., 1889, 1890, 1891, 1893, 1894, 1895, 1896, and on the 15th day of November, 1892. It is further ordered that the witness, D. N. Comingore, make or cause to be made, or permit the plaintiff, its agent or attorneys, to make, true copies of such of said papers as the plaintiff or its attorneys may demand, and that said Comingore, as collector, attest the same and attach his seal of office thereto, if he has such seal, and that he permit the plaintiff or its agent or attorneys to compare said copies with the originals and verify same, and that he shall also testify further in regard to same, if demand be made, and leave is hereby given to complete the taking of said deposition on giving proper notice, and for this purpose the clerk is directed upon request of plaintiff's attorneys to transmit said deposition as now on file to W. A. Price, notary public, Covington, Ky.

It is further adjudged that the action of the notary public, W. A. Price, in adjudging the witness, D. N. Comingore, to be in contempt for failure to file copies of reports, papers, documents, and exemplifications, or to testify as to their contents as requested be sustained and affirmed, and that the Commonwealth of Kentucky recover of said D. N. Comingore the sum of five dollars as a fine, and that he be taken by the sheriff of Kenton county, Kentucky, and confined in the jail of said county for the space of six hours, or until he signifies his willingness to comply with the request made in the deposition attempted to be taken as follows:

Please file official copies of the reports made to your office by

Block & Son as to the amount of liquor which they manufactured and deposited in the bonded warehouses located on their distillery premises from the year 1887 down to the present time, and also official copies of applications made by them to your office during said time for permission to withdraw such liquors from bond.

Also with the following request:

Please file official copies of such reports of the United States storekeepers as show the liquors on hand at the warehouses on the distillery premises of the defendants in Carroll county on September 15th, 1890; Sept. 15th, 1891; Nov. 15th, 1892; Sept. 15th, 1893, 1894, 1895, and 1896."

Afterwards, on June 27th, 1899, the said notary public and plaintiff's attorney appeared at petitioner's office to continue his deposition, and the following colloquy took place:

"I call your attention to the opinion of the court rendered April 3rd, 1899, copy of which has been furnished you and as to which you have had ample time to be advised fully, and now ask if you will file official copies of such reports of the United States storekeepers, spoken of at the time of the former taking of your deposition, as show the amount of liquor on hand at the warehouses of the defendants on their distillery premises in Carroll county, Ky., on September 15, 1890; Sept. 15, 1891; Nov. 15, 1892; Sept. 15, 1893; Sept. 15, 1894; Sept. 15, 1895, and Sept. 15, 1896, or allow us, on behalf of the plaintiffs in this action, access to and inspection of such records or papers for the purposes of taking copies for use on behalf of the plaintiff as evidence in this action?

"Answer. I will have to decline just as I did in the other case and for the same reason as given in the other case."

Q. 24. "Please examine the records and reports under your control and in your custody as collector and state what amount of liquors were contained in the warehouses owned by the defendants in Carroll county on the following dates: Sept. 15th, 1890; Sept. 15th, 1891; Nov. 15th, 1892; Sept. 15th, 1893; Sept. 15th, 1894; Sept. 15th, 1895, and Sept. 15th, 1896.

Answer. "I decline to answer for the same reasons as stated before."

Thereupon the notary public, and not the court nor the clerk thereof, issued an order for committing the petitioner to jail. The order was placed in the hands of the respondent, the sheriff of the county, who took the petitioner into custody, and the writ of *habeas corpus* was applied for and issued.

There is no dispute about the facts, though it may be doubted whether the petitioner's imprisonment was not wholly unauthorized upon the ground that the notary public had no power
26 under the Kentucky Code to issue the process under which the arrest was actually made (sections 535, 538, Civil Code). But the court will not pass upon that point, inasmuch as all parties desire that there shall be a judicial determination of the very important and interesting questions involved, namely: Was it the duty of the collector of internal revenue to answer the questions propounded, and to give the information or furnish the official copies demanded

of him, and has the State of Kentucky, as a litigant in a civil action in her own court, the right to exact it of that officer in such a case?

A question somewhat kindred to these has been passed upon by three different Federal courts. All of the cases, however, were different from this in two important particulars: First, that the information in each of them was desired in aid of the criminal laws of the States in regard to the occupation of retailing distilled spirits, as to which some of the facts are required to be made public by sec. 3240 of the Revised Statutes of the United States; and, second, the latest regulation bearing on the subject had not then been promulgated.

In the case of Hirsch, 74 Fed. Rep., 928, Circuit Judge Shipman, of Connecticut, in an elaborate opinion, held that the collector should be compelled to testify. His opinion seems even to go to the extent of holding that the Treasury Department has no authority of law for making a regulation that would prevent it. The learned judge, in aid of the State court proceeding, seems to have held that the spirit of sec. 3240 of the Revised Statutes required a construction that would compel internal-revenue officers to testify in all cases where information was sought by the State as to who were retail dealers in distilled spirits. If that be correct, it would seem to follow that the same liberality of construction would, on the other hand, require it to be held that the spirit of sec. 3167 forbids any collector to give the information demanded of the petitioner
27 in cases like this; and, indeed, the public policy of the United States might seem also to require this construction. That section prohibits the collector and other internal-revenue officers from disclosing certain information they acquire from visits to distilleries, &c.

In a somewhat earlier case, *In re* Huttman, 70 Fed. Rep., 701, Judge Williams, of the district of Arkansas, sitting by designation in Kansas, had expressed views exactly contrary to the Hirsch case, though this fact does not seem at that time to have come to the notice of Judge Shipman.

In the latest case, *In re* Weeks, 82 Fed. Rep., 729, Judge Wheeler, of the district of Vermont, held with Judge Williams that the collector was not required to answer.

This conflict of authority seems to make necessary, or at least appropriate, a further examination of the whole subject.

It should not be, and I think never is, the purpose or desire of the Federal tribunals to interfere with any of the legitimate functions of the State courts or officers. Indeed, the leaning will be in the other direction. Judicial proceedings, Federal and State, are essential to the good order of society and to the protection of the rights of the individual citizen. Those proceedings would often prove abortive if the courts had not the most extensive powers as well as full authority to compel witnesses to testify to facts within their knowledge, and indeed to produce papers under their individual control in proper cases. This general proposition is certainly true, notwithstanding there are many exceptions to it, notably such as pertain to privileged communications, incompetent testimony, testi-

mony that would tend to degrade the witness or subject him to criminal prosecution, and such as is forbidden by public policy.

In this case if the petitioner had been called to testify only as to facts within his personal knowledge no law would exempt
28 him from that duty if what he knew was competent testimony and its admission was not forbidden by other rules. It is not claimed that any of the information desired at his hands is within his personal knowledge. It is all contained in certain reports made to him by the distillers and by other United States officers and which are in his possession in his official capacity as an officer of the United States.

As it is clear that they are not his private property, it is essential to accurately ascertain the nature of those reports and his relations to them and his duties respecting them.

In order to obtain money for the support of the Government, Congress has passed laws for the collection of the revenue to be derived from internal sources. A complete system has been established. It is placed under the Treasury Department. The Secretary of the Treasury is its head. It is operated through the bureau of internal revenue, at the head of which is the Commissioner. The entire system is under his supervision, but subject to the control of the Secretary of the Treasury.

Section 3301, Revised Statutes, provides that every storekeeper shall on the first Monday of every month make a report to the collector of the quantity of distilled spirits in the warehouse in his charge, and section 3307 requires that the distiller shall monthly make and swear to a report substantially similar.

These reports thus made to the collector in the course of administering the laws of the United States, and for this executive purpose alone, are now demanded of him by the State officials in the manner before shown.

Under the law in the exceptional instance of a distiller the property of the citizen is arbitrarily laid hold of by the United States as soon as it is manufactured and is kept under its control until the tax is paid, possibly eight years afterwards. Meantime these reports must be made. So far as the information contained in
29 the reports is obtained from the distiller, it is extorted for the sole purpose of enabling the United States to ascertain and collect from him its revenues. This purpose is all that relieves both this act and that of so long holding his property from being mere tyranny. The information derived from these reports is not obtained for publication in any manner; it is entirely official. Under this state of fact it does not seem to the court that these reports are in any sense records open to the use of the public. They are the property of the United States in the custody of its officers. They were exacted for the sole purpose of collecting revenue. It is true that they are property of a peculiar character, but that does not alter the fact. Property is defined as being the exclusive right of control and dominion over a thing and may include anything that is subject to ownership. Public records and documents are such as are placed on the public files for the use or information of

the public, to which the public has access and of which the public has the right, usually upon payment of certain fees, to demand copies. They are not property in any ordinary sense. In many cases copies of the public records of the United States may be authenticated by the head of the department or other ultimate custodian. Familiar instances of such public records are those in judicial proceedings and where documents are required to be registered or recorded, patents for land, and many others. (See Boyden *vs.* Burke, 14 Howard, 575.)

But there is no statute or law of the United States which authorizes or permits the collector of internal revenue to make or to certify for use by any one else copies of the reports which have been gathered for particular governmental purposes.

The United States has not authorized the use of these executive documents by anybody for any purpose except the official one for which the reports were made. No statute is shown which
30 gives the litigant in this case any right to claim the use of this property—the private property of the United States—for any purpose whatever. The petitioner is the immediate custodian thereof under the control of his superior officers. They have forbidden him to put this property of the United States to the uses required by the litigant in the State court, and yet the petitioner is arrested for obeying the orders of his superior officers respecting private papers of the Government in which the State of Kentucky has no interest whatever and over which it has no more lawful control than it has over any other property of the United States. The purpose for which the litigant desires this property cannot affect the question of its right to it. It would not be contended that the State of Kentucky had any right to claim this property or its use except for the single quality it is supposed to have of silently testifying upon the issues involved in the case against Elias Block & Sons. No logic is perceived in the possible suggestion that that makes a difference in right, though it may make the use more desirable in fact.

The State, except so far as it may be given by statute, has no right over the property or the archives of the United States Government.

No statute is shown to justify the claim now made, though a statute is necessary to make the claim good. No sovereign can claim or obtain the right to demand the use of the archives or quasi-private documents of another sovereign without its consent expressly given, and public policy forbids that any attempt to extort such use should be encouraged. Most unseemly, not to say dangerous, consequences might otherwise ensue.

The State, while it may compel the petitioner as a mere individual to tell what he may know in that capacity, has no power to control him as an officer nor to regulate the conduct of his official duties with reference to these reports nor their contents, as those duties can only be fixed by the laws of the United States and the
31 orders and regulations of his superior officers.

Among the official duties thus prescribed for the petitioner

in the conduct of his office and respecting the care of the property of the United States committed to his custody is that which requires that he shall not do with it what is demanded at his hands in this case.

It may be assumed to be clear that a State statute cannot impose duties upon a Federal officer as such, much less can a State court do so. The attempt to do it in this case through the medium of a process of contempt must fail, because the State shows no statutory right thus to appropriate the property of the United States nor to impose a duty upon its officers. If it were otherwise and if the officers of the United States in the discharge of their duties could be interfered with by State courts or officers, it might soon produce a state of affairs that would be intolerable. It might, for example, take much of their time or put them to great expense. If the State courts could for this purpose appropriate this property or could compel official copies to be made or official information to be compiled, where would the line be drawn, and *vice versa*, if the Federal authorities or courts could interfere with the duties of State officers, except in those cases expressly authorized by the supreme law of the land, or necessary to carry into effect the laws of the United States or to enforce the judgments of her tribunals. There is no law of the United States which would give the Federal authorities power over the property of a State except occasionally through the writ of *ad quod damnum* and through the exercise of the right of eminent domain.

While these views are believed to be correct as to mere property as distinguished from true public records, as above defined, it probably might not be held that Federal courts, on the one hand, and State courts, upon the other, were incompetent to compel custodians of public records either to give copies lawfully demanded upon payment
32 of fees or else to attend with the records in proper cases under a *subpœna duces tecum*. But this would be upon the ground that they are records to which all the public has the right of access. The right, however, if held to exist, would not extend to another class of papers which the State might own and which pertained to the conduct of its government and which its policy has not opened to the public. For example, in the early case of Morris *vs.* Creel, 2 Virginia Cases, 49, it was held that a paper submitted to the executive council of Virginia for the purpose of enabling it to perform its executive functions ought not to be withdrawn by the clerk without the order of the council, and therefore no attachment should be awarded against the clerk for refusing to obey a *subpœna duces tecum* commanding him to produce the paper to be read in evidence.

Every paper in the custody of public officers is not a public record. Some, as in this case, may be mere papers belonging to the United States as documents pertaining to the administrative affairs of the United States and as mere property which the United States has obtained for its mere executive purposes and over which, through its proper agents and officers, it has exclusive control, and which the State cannot demand for purposes of testimony or otherwise,

contrary to regulations made under the authority of the Federal statutes.

It is altogether correct to say that neither the Secretary of the Treasury alone nor the Commissioner of Internal Revenue, with his approval, can make regulations having the force of law unless authorized to do so by congressional enactment, but it is also believed to be true that sections 161, 261, and 321 together are ample to authorize the making of the regulations hereinafter set forth. They contain provisions as follows:

By SEC. 161. "The head of each department is authorized to prescribe regulations, not inconsistent with law, for the government of his department, the conduct of its officers and clerks, the distribution and performance of its business, and the custody, use and preservation of the records, papers and property appertaining to it."

33 By sec. 261 it is provided: "The Secretary of the Treasury shall prescribe rules and regulations not inconsistent with law, to be used under and in the execution and enforcement of the various provisions of the internal-revenue laws, and give such directions to collectors and prescribe such rules and forms to be observed by them as may be necessary for the proper execution of the law;" and,

By sec. 321, that "the Commissioner of Internal Revenue, under the direction of the Secretary of the Treasury, shall have general superintendence of the assessment and collection of all duties, and taxes now or hereafter imposed by any law providing internal revenue and shall prepare and distribute all the instructions, regulations, directions, forms, blanks, stamps, and other matters pertaining to the assessment and collection of internal revenue."

At all events, the following regulations were made, namely:

"TREASURY DEPARTMENT,
OFFICE OF THE COMMISSIONER OF INTERNAL REVENUE,
WASHINGTON, D. C., *April* 15, 1898.

The following regulations are issued as supplementary to the instructions and suggestions contained on pages 41 and 42 of the regulations, series 7, No. 12, revised August 3, 1896:

All records in the offices of collectors of internal revenue or any of their deputies are in their custody and control for purposes relating to the collection of the revenues of the United States only. They have no control of them and no discretion with regard to permitting the use of them for any other purpose.

Collectors are hereby prohibited from giving out any special tax records or any copies thereof to private persons, or to local officers, or to produce such records or copies thereof in a State court, whether in answer to *subpœnas duces tecum* or otherwise.

Whenever such subpœnas shall have been served upon them, they will appear in court in answer thereto and respectfully decline to produce the records called for, on the ground of being prohibited therefrom by the regulations of this department.

The information contained in the records relating to special-tax payers, in the collector's office, is furnished by these persons under

compulsion of law for the purpose of raising revenue for the United States; and there is no provision of law authorizing the sending out of these records or any copies thereof for use against the special-tax payers in cases not arising under the laws of the United
34 States. The giving out of such records or any copies thereof by a collector in such cases is held to be contrary to public policy and not to be permitted.

As to any other records than those relating to special-tax papers, collectors are also forbidden to furnish them or any copies thereof at the request of any person. Where copies thereof are desired for the use of parties to a suit, whether in a State court or in a court of the United States, collectors should refer the persons interested to the following paragraph in rule X of the rules and regulations of the Treasury Department, namely:

In all cases where copies of documents or records are desired by or on behalf of parties to a suit, whether in a court of the United States or any other, such copies shall be furnished to the court only, and on a rule of the court upon the Secretary of the Treasury requesting the same.

Whenever such rule of the court shall have been obtained collectors are directed to carefully prepare a copy of the record or document containing the information called for and send it to this office, whereupon it will be transmitted to the Secretary of the Treasury with a request for its authentication, under the seal of the department, and transmission to the judge of the court calling for it, unless it should be found that circumstances or conditions exist which make it necessary to decline, in the interest of the public service, to furnish such copy.

N. B. SCOTT,
Commissioner.

Approved:
L. J. GAGE,
Secretary of the Treasury."

Now, as against persons desiring to use the property of the United States these statutes should be liberally construed to preserve that property, and no third person has any right to gainsay it. He has no interest in the property. At all events, it is believed that the statutes and regulations constitute a binding rule for collectors of internal revenue, in their control of the Government prop-
35 erty entrusted to their care, sufficient to justify them in rendering obedience to their chief, especially as against all outside persons, and also sufficient to excuse them for refusing to permit anybody to use or to get the benefit of that property who does not show some positive law of the United States as a basis of a demand for it.

Here the State of Kentucky is a litigant only in a civil suit, and it may well be supposed that the general principle that when a government abandons its sovereignty and becomes a private litigant it is subject to ordinary rules should have some application, but whether so or not the court is convinced that the State can

manifest no right to the papers asked for, except by means of some statutory enactment bestowing it or through some act of courtesy, as distinguished from a right, on the part of the lawful custodian.

It is an old rule that one government will not aid another in enforcing its revenue laws. Whether it should be applied to the operations of our State and national governments need not, in the abstract, be considered. Certain it is, however, that no law of the State can be found which is intended to aid the national Government in the collection of its revenue, nor can any be found in the statutes of the United States which was intended to assist the States. Whether comity would require such enactments on the part of both need not be considered. The fact remains that such legislation has not been regarded as at all needful or desirable. The United States has a complete revenue system of its own, and equally so has the State. They are and must necessarily be entirely independent of each other, though, in some respects, notably in the matter of taxing the occupation of a retail dealer in distilled spirits, the statutes of the United States make it plain that by taxing the occupation it is by no means meant to authorize such occupation contrary to local laws. It only intends to tax the occupation if it is in
36 fact carried on, but does not authorize it to be carried on.

This is the basis of the provisions of section 3240 as well as 3243 of the Revised Statutes, and it should not be overlooked that while, by the regulations above given, the Treasury officials undertake to control the use of the *the* reports referred to, they do not undertake altogether to deprive litigants of their use as testimony, except so far as the lawful custodian thereof regards it as incompatible with the public interest. While he has the right and the power altogether to exclude others from all use of such property, yet, under certain circumstances, as matter of courtesy, copies of the papers will be furnished. Surely the owner of property or his sole agent may annex conditions to a grant of the use of it.

Indeed there might be many considerations of public policy to support that course in case of merely executive or administrative papers like these, considerations affecting both the amount and safety of the revenue.

Nor is the State of Kentucky powerless. It has its own independent and complete system for taxing distilled spirits. True the power of the United States is supreme to the extent of having the first right, but the statutes of the State (section 4105 to 4114, inclusive, Ky. Stat.) provide ample machinery for compelling reports from distillers, and, indeed, everything else necessary for the purpose. The State has neither occasion nor right to call upon the United States nor her officers for reports made under the admistration of its laws in order to enforce the collection of the State revenue, nor would the United States have the right to call upon the State. Each government must take care of its own concerns in such matters, and it is much doubted by the court whether the Commonwealth of Kentucky or the government thereof in any way really makes or desires to make this claim, although her name is

used in the suit in the Carroll county court by the auditor's agent.

37 It may be added that the court has been influenced somewhat by the conviction that if the copies of the reports and the desired information were obtained from the collector they would be altogether inadmissible and incompetent as evidence, and that it would be ultimately *be* so held by the State court. While the collector was practically ordered by the State court to furnish or permit to be taken copies of the reports or else to compile therefrom the data demanded, there is no law authorizing the collector to authenticate copies of papers, nor to compile figures from them so as to make them admissible as evidence, and the State court cannot impose the duty upon him. He should not be imprisoned because the head of the department will refuse to authenticate them, and a statement by him of what the papers contain, without producing the originals or authenticated copies, would probably be mere hearsay and by no means the best evidence of their contents; and if there has been a fishing expedition merely to get information upon which to base ulterior movements by the plaintiff in the suit, surely the commitment of the petitioner would then be altogether inexcusable.

To sum up the whole matter, the court has reached the conclusion:

1st. That the reports are executive documents, which the United States in its sovereign capacity has acquired for the sole purpose of administering its own governmental affairs.

2nd. That the officers of the national Government cannot be compelled by another sovereignty to put those documents at its disposal without some express law of the United States authorizing it.

3rd. That such documents are privileged and to a certain extent quasi-confidential communications, the use of which is limited to the purposes for which they are made, unless the parties interested consent to a more extensive use. This proposition more especially applies to the reports of the storekeeper.

38 4th. That any demand for their use by any outside party must depend for success upon the courtesy of the Government and upon its notion as to the public policy of complying with the request.

5th. That no litigant has any right to their use in any other way or upon any other basis than such as may be fixed by the United States or under its authority.

6th. That the reports are property, and their ownership rests in the United States.

7th. That the State of Kentucky, either as a litigant or otherwise, has no right to exercise any control over them through its courts or otherwise except as the right may be given by congressional enactment or the courtesy of the Government.

8th. That the Secretary of the Treasury has lawful authority to control or to make regulations for controlling that property and its custody.

9th. That the regulations made were within its authority and show the only way in which the courtesy of the Government respecting the matter in hand will in the absence of legislation be exercised, and the courts have no power to overrule it.

10th. That the State court had no lawful jurisdiction, right, or power to impose upon the collector, an officer of another sovereignty, the duty of making copies of the reports, or that of permitting others to make them, or that of compiling information from their contents.

11th. That the reports were parts of the governmental archives accumulated through mere executive and administrative processes, and as such are privileged at least to the extent that no other sovereignty in its own interest can seize or control them for any purpose whatever without the consent of the sovereign owner lawfully manifested; and

12th. That the effort to make the collector testify to their contents is virtually an attempt to compel the United States to produce them.

39 The proposition underlying all the others is that nobody can acquire any control over or right in this class of papers belonging to the United States in any manner, except by its authority.

These conclusions seem to be supported by—

1 Greenleaf on Evidence, sections 250 and 251.
Jones, Law of Evidence, section 780.
United States *vs.* Eliason, 16 Peters, 291.
Hagood *vs.* Southern, 117 U. S., 52.
Ableman *vs.* Booth, 21 Howard, 506.
Cunningham *vs.* Macon, &c., R. R., 109 U. S., 451, 452.
Electoral Collecge Case, 8 Fed. Cases, 427.
Boyd *vs.* United States, 116 U. S., 616.
Black on Constitutional Law, 441.
Ex parte Reed, 100 U. S., 13.
Carr *vs.* United States, 98 U. S., 433.
Virginia Coupon Cases, 114 U. S., 286.
In re Ayers, 123 U. S., 443.

And to illustrate further it may be added upon the authority of *Ex parte* Roland, 104 U. S., 612, that if a mandamus should be sought in this case it would not lie, because no statute has ever made it the duty of the collector to do as required by the State.

Of course, it has not been forgotten nor overlooked that there are cases where the production of private papers in the possession of third persons not parties to the litigation can be exacted, but this is generally where the litigant has a rightful interest in them. The rule has no application here.

1 Greenleaf on Evidence, sec. 559.
1st ed. Am. & Eng. Ency. of Law, p. 257.

Otherwise the party is left to his own resources to obtain the paper or to lay the foundation for secondary evidence of its
40 contents. If the litigant has no right in or to the papers in the hands of the third person, nor any legal interest in them,

District Court of the United States for the District of Kentucky.

In the Matter of DAVID N. COM-GORE.

Assignment of Errors.

Comes now the respondent, John T. Boske, sheriff of Kenton county, Kentucky, and filed the following assignment of errors, upon which for himself and the Commonwealth of Kentucky he will rely in the prosecution of the appeal from the decision and judgment rendered by this honorable court on the 5th day of July, 1899, in the above-entitled matter:

1. That the said court erred in rendering the decision and judgment in the said matter against the respondent, acting as sheriff for and on behalf of said Commonwealth of Kentucky, as shown by him in his return to the writ issued herein against him, and in deciding that the imprisonment and detention of the relator by the respondent was in violation of the Constitution and laws of the United States, and in discharging the prisoner from custody and in rendering judgment against this respondent for costs, and that said judgment and decision is contrary to law and the facts, as stated in the pleadings in said matter.

44 2. That the said court erred in refusing to permit the introduction of the testimony of the witness Maxwell S. Barker, as follows: That he, while acting as State auditor's agent for Jefferson county, Kentucky, had obtained from collectors of internal revenue the information shown by their records, documents, and reports as to the amount of liquors stored in the bonded warehouses and the times and amount of withdrawals of liquors from bond, when he had the consent of the distillers as to whose product the information was sought, and the offer made in connection therewith to amend respondent's return to the writ.

3. That the court erred in not rendering a decision dismissing the petition, discharging the writ, and remanding the prisoner to the custody of respondent as sheriff aforesaid.

Wherefore respondent and appellant prays that the decision and judgment of said court be reversed and such directions given that full force and efficacy may be allowed to the process and writs of the Commonwealth of Kentucky by reason of the defense set up in the return and response to the writ issued against him herein, and for all proper relief.

WINSLOW & WINSLOW,
Attorneys for John T. Boske, Sheriff Kenton Co., and Commonwealth of Kentucky.

The appeal bond above referred to is as follows:

District Court of the United States, District of Kentucky.

In the Matter of DAVID N. COMINGORE, *Ex Parte.*

Know all men by these presents that we, John T. Boske, sheriff of Kenton county, Kentucky, principal, and George B. Winslow

and H. M. Winslow, as sureties, are held and firmly bound unto David N. Comingore in the sum of five hundred dollars, to be paid to the said David N. Comingore, executors or administrators;
45 to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals and dated this 12th day of July, A. D. 1899.

Whereas the above-named John T. Boske, sheriff of Kenton county, Kentucky, hath prosecuted an appeal to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled suit by the district court of the United States for the district of Kentucky, at Louisville:

Now, therefore, the condition of this obligation is such that if the above-named John T. Boske, sheriff of Kenton county, Kentucky, shall prosecute his said appeal to effect and answer all costs if he shall fail to make good his plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

JOHN T. BOSKE, [L. S.]
Sheriff of Kenton Co., Ky.,
By WINSLOW & WINSLOW, *Att'ys.*
H. M. WINSLOW. [L. S.]
GEORGE B. WINSLOW,
By HENRY M. WINSLOW,
Att'y-in-fact. [L. S.]

Sealed & delivered in presence of—
HENRY F. CASSIN,
Deputy Clerk, U. S. Courts.

[10-cent stamp.]

CARROLLTON, KY., *July 11th*, 1899.

Know all men by these presents that I, George B. Winslow, of Carrollton, Ky., do hereby authorize and empower Henry M. Winslow, of Carrollton, Ky., as attorney-in-fact for me and in my name, place, and stead to sign my name as surety to any bond for costs or supersedeas bond or appeal bond that may be proper or necessary to be executed in order to appeal from the decision and judgment of the district court of the United States for the district of Kentucky in the matter of *habaas corpus* proceedings in behalf of D. N. Comingore, and supersede the same on appeal to the U. S.
46 Supreme Court or any other court to which he asks an appeal, giving to his acts in the premises the same effect as if done by me in my own proper person.

GEORGE B. WINSLOW.

Attest: JAMES L. WEBSTER.

DISTRICT OF KENTUCKY, *ss:*

I, Thomas Speed, clerk of the district court of the United States for the district of Kentucky, at Louisville, do hereby certify that the foregoing 45 pages contain a true and correct transcript of the

record and proceedings in the matter of David N. Comingore, *ex parte*, as the same appears from the files and records in my said office.

Witness my hand and seal of said court this 21st day of July, A. D. 1899.

[Seal District Court of the United States for Ky. District.]

THOS. SPEED, *Clerk*,
By HENRY F. CASSIN, *D. C.*

47 UNITED STATES OF AMERICA, } *ss.*:
District of Kentucky, Sixth Judicial Circuit, }

To David N. Comingore, Greeting:

You are hereby cited and admonished to be and appear at a session of the United States Supreme Court, to be holden at the city of Washington on the* 12th day of August next, pursuant to an appeal granted by the district court of the United States for the district of Kentucky, wherein John T. Boske, sheriff of Kenton county, Kentucky, is appellant and you are appellee, to show cause, if any there be, why the judgment rendered against the said appellant, as in the said appeal mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Seal District Court of the United States for Ky. District.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 13th day of July, in the year of our Lord one thousand eight hundred and ninety-nine, and of the Independence of the United States of America the one hundred and twentyjfourth.

WALTER EVANS,
Dist. Judge.

---

* Not exceeding 30 days from the day of signing.

48 I accept service of within citation for D. N. Comingore, July 21st, 1899.

R. D. HILL,
Att'y for D. N. Comingore.

Endorsed on cover: File No., 17,484. Kentucky D. C. U. S. Term No., 370. John T. Boske, sheriff of Kenton county, Kentucky, appellant, *vs.* David N. Comingore. Filed August 9th, 1899.